

ISMAIL ABDULLAH

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v.

TENAGA NASIONAL BHD

COURT OF APPEAL, PUTRAJAYA

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ABDUL MALIK ISHAK JCA

KN SEGARA JCA

ABDUL WAHAB PATAIL JCA

[CIVIL APPEAL NO: K-03-1-2008]

23 JUNE 2010

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CIVIL PROCEDURE: *Summary judgment - Triable issues - Whether any raised by defendant - Plaintiff appealing against decision of High Court setting aside summary judgment - Decision of state authority on appeal from award of district land administrator - Whether final and unappealable - Electricity Supply Act 1990, ss. 11 & 16*

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LAND LAW: *Wayleave - Compensation - Electricity Supply Act 1990, ss. 11 & 16 - Award by district land administrator and finality of appeal to state authority - Whether High Court has power to review decision of state authority - Electricity Supply Act 1990, s. 16*

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WORDS & PHRASES: *“shall be final” - Electricity Supply Act 1990, s. 16(2) - Mandatory - Not appealable - Whether High Court has power to review decision of state authority*

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Pursuant to s. 11 Electricity Supply Act 1990 (‘ESA’) the respondent entered upon two portions of the appellant’s land to construct electricity supply lines. Compensation was ordered by the district land administrator to be paid to the appellant under s. 16 ESA, namely, RM10,124 for Lot 1026 (1.442 acres) and RM15,310 for Lot 2062 (0.820 acres). Dissatisfied, the appellant appealed against the sums awarded, and the state authority which heard the appeal increased the amount of compensation to RM247,808 and RM557,108 respectively. The respondent refused to pay the revised compensation ordered, and the appellant filed its writ and statement of claim and, thereafter, obtained judgment against the respondent under O. 14 Rules of the High Court 1980. On appeal by the respondent, the learned JC set aside the summary judgment and the appellant appealed to the Court of Appeal.

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A Held (allowing the appeal)

Per Abdul Malik Ishak JCA delivering the judgment of the court:

- B** (1) The compensation as reviewed and awarded by the state authority – on appeal from the award of the district land administrator – was final and unappealable. This was clear from the mandatory words “shall be final” in s. 16(2) ESA. The learned JC should have dismissed the respondent's appeal and affirmed the decision of the deputy registrar granting the appellant summary judgment – bearing in mind the purport and intent of s. 16(2) ESA. The learned JC had erred in faulting the state authority for not assigning any reasons for its decision; it did not have to under s. 16(2) ESA. The state executive council had acted as the state authority and its decision was a state secret. The High Court had no power to review the decision of the state authority here. (paras 23-24, 29, 36, 38-39 & 56-61)
- C**
- D**
- E** (2) There were no triable issues raised by the respondent. The O. 14 application was the correct approach to adopt. (paras 16, & 19-21)

[Decision of court below set aside.]

Bahasa Malaysia Translation Of Headnotes

- F** Berdasarkan s. 11 Akta Bekalan Elektrik 1990 ('ABE'), responden telah memasuki dua bahagian tanah perayu untuk membina pendawaian bagi bekalan elektrik. Pampasan telah diperintahkan kepada perayu oleh pentadbir tanah daerah di bawah s. 16 ABE, iaitu RM10,124 bagi Lot 1026 (1.442 ekar) dan RM15,310 untuk Lot 2062 (0.820 ekar). Tidak berpuas hati, perayu merayu terhadap jumlah pampasan, dan pihak berkuasa negeri, yang mendengar rayuan, telah menaikkan jumlah pampasan masing-masing kepada RM247,808 dan RM557,108. Responden enggan membayar jumlah pampasan disemak seperti yang diperintahkan.
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- H** Berikutan itu, perayu memfailkan writ dan penyata tuntutan dan sekaligus memperoleh penghakiman terhadap responden di bawah A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Semasa rayuan oleh responden, yang arif PK telah mengenenpikan penghakiman terus dan perayu merayu ke Mahkamah Rayuan.
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Diputuskan (membenarkan rayuan)

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Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

- (1) Pampasan seperti yang disemak dan diawardkan oleh pihak berkuasa negeri – ekor an rayuan terhadap award pentadbir tanah daerah – adalah muktamad dan tidak boleh dirayui lagi. Ini jelas dari perkataan mandatori “shall be final” di dalam s. 16(2) ABE. Mengambil kira matlamat dan tujuan s. 16(2) ABE, yang arif PK seharusnya menolak rayuan responden dan mengesahkan keputusan timbalan pendaftar membenarkan penghakiman terus kepada perayu. Yang arif PK khilaf apabila mempersalahkan pihak berkuasa negeri kerana tidak memberi sebarang alasan bagi keputusannya; pihak berkuasa negeri tidak perlu berbuat demikian di bawah s. 16(2) ABE. Majlis mesyuarat negeri telah bertindak sebagai pihak berkuasa negeri dan keputusannya adalah rahsia negeri. Mahkamah Tinggi tiada kuasa untuk menyemak keputusan pihak berkuasa negeri di sini.
- (2) Tiada isu yang boleh dibicarakan telah dibangkitkan oleh responden. Maka permohonan A. 14 adalah pendekatan yang betul yang perlu diambil.

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[Keputusan mahkamah di bawah diketepikan.]

Case(s) referred to:

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Aziz Abdul Rahman v. Attorney-General, Singapore [1978] 1 LNS 13 HC (dist)

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC (dist)

Bank Negara Malaysia v. Mohd Ismail Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ 14 SC (foll)

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Beard v. Hall [1908] 1 Ch 383 (refd)

Cullimore v. Lyme Regis Corporation [1962] 1 QB 718 (refd)

European Asian Bank AG v. Punjab & Sind Bank (No 2) [1983] 1 WLR 642 (refd)

In re Burton and Blinkhorn [1903] 2 KB 300 (refd)

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In re Houghton, Houghton v. Houghton [1915] 2 Ch 173 (refd)

Israel Discount Bank of New York v. Hadjipateras And Another [1984] 1 WLR 137 (refd)

Kertih Port Sdn Bhd v. Owners of the Vessel “Shema” [2009] 3 CLJ 574 HC (refd)

Mayban Finance Bhd v. Wong Gieng Suk & Anor [2003] 1 CLJ 27 (refd)

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Nassau Steam Press v. Tyler And Others [1894] 70 LT 376 (refd)

Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA (refd)

PP v. Datuk Haji Harun Haji Idris & Ors [1977] 1 LNS 92 HC (refd)

- A *Re Racal Communications Ltd* [1980] 2 All ER 634 (**foli**)
Rex v. Worcestershire Justices – Ex parte Lower Avon Navigation Company, Limited [1939] 55 TLR 657 (**refd**)
The British Insulated Wire Company, Limited v. The Prescott Urban District Council [1895] 2 QB 463 (**refd**)
- B *Verrall v. Great Yarmouth Borough Council* [1981] QB 202 (**refd**)
Woodward v. Sarsons And Sadler (Birmingham Municipal Election) [1875] LR 10 CP 733 (**refd**)

Legislation referred to:

- Electricity Supply Act 1990, ss. 11(1), (2), (6), (7), 16(1), (2)
- C Laws of the Constitution of Kedah, art. 34
 Local Government Act 1976, s. 2
 National Land Code, s. 418(1)
 Rules of the High Court 1980, O. 14 r. 3(1)
- Companies Act 1948 [UK], s. 441(3)
- D Public Health Act 1875 [UK], s. 174(2)
 Solicitors Act 1843 [UK], s. 32
 Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 31(1)(d)

Other source(s) referred to:

- Roscoe Pound, *Law and Morals – The Ideal Element in Law*, [1958] para. 62
- E *For the appellant – Dato RK Nathan (Vinod Kamalanathan with him);
 M/s Vinod Kamalanathan & Assocs*
*For the respondent – Steven Thiru (Shamsul Bahrin Manaf with him);
 M/s Shook Lin & Bok*
- F [Appeal from High Court, Alor Setar; Writ Summons No: 22-16-2005]
Reported by Gan Peng Chiang

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JUDGMENT**Abdul Malik Ishak JCA:****Introduction**

- H [1] After having filed his writ and his statement of claim, the appellant (Ismail bin Abdullah) applied for summary judgment against the respondent (Tenaga Nasional Berhad) under O. 14 of the Rules of the High Court 1980 (“RHC”). On 27 November
- I 2006, the deputy registrar allowed the appellant’s summary judgment application.

[2] Aggrieved by the decision of the deputy registrar, the respondent filed an appeal to the High Court. On 10 December 2007, the learned Judicial Commissioner (“JC”) allowed the respondent’s appeal. It is against the decision of the learned JC in respect to the O. 14 matter that the appellant appeals to this court.

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[3] However, on 19 December 2006, the respondent filed an application to amend its statement of defence in encl. 46 after the deputy registrar had allowed the appellant’s summary judgment application.

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[4] On 22 February 2007, the application to amend the respondent’s statement of defence in encl. 46 came up for hearing before the senior assistant registrar (“SAR”). On 12 March 2007, the SAR dismissed encl. 46.

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[5] The respondent then appealed to the High Court and, on 6 November 2007, the learned JC allowed the respondent’s application to amend the statement of defence with costs without first hearing the respondent’s appeal against the order granting summary judgment.

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The Background Facts

[6] Sometime in 1995, the respondent commenced the “wayleave” procedures under s. 11(1) of the Electricity Supply Act 1990 against certain portions of lands in Kota Setar, Kuala Muda, Pendang and Kubang Pasu districts in Kedah for purposes of constructing the electricity supply lines from Gurun to the border (Malaysia/Thailand).

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[7] Two portions of the appellant’s lands in Pendang were affected. The first was at Lot 1026 involving 1.442 acres. The second would be Lot 2062 involving 0.820 acres. To achieve its desired purposes, the respondent issued the requisite notices under s. 11(2) of the Electricity Supply Act 1990.

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[8] The appellant as the land owner objected to the “wayleave” exercise in so far as his lands in Pendang were concerned. An enquiry under s. 11(6) of the Electricity Supply Act 1990 was then conducted by the District Land Administrator (hereinafter referred to as the “DLA”). By virtue of s. 11(7) of the Electricity Supply Act 1990, the DLA authorised the proposed utilisation of the appellant’s portions of the lands by the respondent and the DLA also ordered the respondent pursuant to s. 16(1) of the

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A Electricity Supply Act 1990 to pay the appellant compensation in the sums of RM10,124 and RM15,310 respectively for both portions of the lands respectively.

B [9] The appellant appealed against the compensation sums ordered by the DLA to the Majlis Mesyuarat Kerajaan Negeri Kedah (hereinafter referred to as “MMK”) pursuant to s. 16(2) of the Electricity Supply Act 1990.

C [10] The MMK acting as the State Authority under ss. 11(7) and 16(2) of the Electricity Supply Act 1990 decided in favour of the appellant and varied the order of the DLA by requiring the respondent to pay the appellant the sums of RM247,808 and RM557,108 respectively for the two lots totalling RM804,916 as compensation and this information was conveyed through the Pengarah Tanah dan Galian’s (PTG’s) letter dated 28 September 2005 (see pp. 501 to 503 of the appeal record at Jilid 3).

D [11] The respondent refused to pay the sum of RM804,916 to the appellant in spite of the notice of demand dated 19 November 2004. The appellant had no choice but to file his writ and his statement of claim seeking for the sum of RM804,916 from the respondent. The appellant succeeded in his O. 14 application before the deputy registrar but was unsuccessful before the learned JC pursuant to an appeal by the respondent. Hence, the present appeal before us.

F **Analysis**

G [12] In a summary judgment proceeding, the defendant is required to satisfy the court under O. 14 r. 3(1) of the RHC that there is an issue or question in dispute which ought to be tried or that there ought “for some other reason to be a trial.”

H [13] The Supreme Court decision in *Bank Negara Malaysia v. Mohd Ismail Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 is the leading authority on an O. 14 application. Mohamed Azmi SCJ, writing for the majority, had this to say at p. 19 of the report:

I In our view, basic to the application of all those legal propositions, is the requirement under O. 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.

[14] Continuing on the same page, his Lordship Mohamed Azmi SCJ said: A

Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue. B

[15] Finally, towards the end of the same page, his Lordship Mohamed Azmi SCJ aptly said: C

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. D

[16] Where the defendant's defence is unsustainable in law or on the facts an O. 14 application is an expeditious procedure that would enable the plaintiff to dispose of an action and is the best method of saving time and costs. A full blown trial, unnecessary in such circumstances, is avoided. But where there are triable issues, summary judgment would not be an appropriate alternative (*Mayban Finance Bhd v. Wong Gieng Suk & Anor* [2003] 1 CLJ 27). E F

[17] Roskill LJ in *Verrall v. Great Yarmouth Borough Council* [1981] QB 202, 218, CA, aptly said:

We have often said in this court in recent years that where there is a clear-cut issue raised in Order 14 proceedings, there is no reason why the judge in chambers-or, for that matter, this court-should not deal with the whole matter at once. Merely to order a trial so that the matters can be re-argued in open court is to encourage the law's delays which in this court we are always trying to prevent. The first point fails. G H

[18] Robert Goff LJ in *European Asian Bank A.G. v. Punjab & Sind Bank (No. 2)* [1983] 1 WLR 642, 654, CA, made the following germane observations:

Moreover, at least since *Cow v. Casey* [1949] 1 KB 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under RSC, O. 14, even if the question of law is at first blush of some complexity and therefore I

- A takes ‘a little longer to understand.’ It may offend against the ‘whole purpose of Order 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal; see
- B *Verrall v. Great Yarmouth Borough Council* [1981] QB 202, 215, 218, per Lord Denning MR and Roskill LJ. The policy of Order 14 is to prevent delay in cases where there is no defence; and this policy is, if anything, reinforced in a case such as the present, concerned as it is with a claim by a negotiating bank under a
- C letter of credit: compare *Bank für Gemeinwirtschaft Aktiengesellschaft v. City of London Garages Ltd.* [1971] 1 WLR 149, 158, per Cairns LJ, a case concerned with a claim on a bill of exchange by a holder in due course.
- D [19] Thus, where an issue raised in an O. 14 application is one of law and is clear-cut, it should be disposed off forthwith instead of going to trial.
- E [20] And this is the right approach to adopt notwithstanding that, “The effect of O. 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no *bona fide* triable issue” (per Gopal Sri Ram JCA (later FCJ) in *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609, at p. 615).
- F [21] If the point of law is clear and the court is satisfied that it is really unarguable, then leave to defend will be refused (*Israel Discount Bank of New York v. Hadjipateras And Another* [1984] 1 WLR 137, at 145, CA; [1983] 3 All ER 129, at 135, CA). And where the words of the statute under which the action was
- G brought clearly made the defendants liable, the court in *Nassau Steam Press v. Tyler And Others* [1894] 70 LT 376 refused to give leave to defend.
- H [22] Now, this appeal brings into sharp focus the rigours of the Electricity Supply Act 1990 and, in particular, s. 16(2) of the same Act which enacts as follows:
- Compensation
- I 16(2) Any person aggrieved with the District Land Administrator’s assessment may within twenty-one days after the assessment appeal to the State Authority whose decision shall be final.

[23] It means what it says. Precisely put: the decision of the State Authority – referring to MMK, shall be final. And in refusing to settle the sum of RM804,916 awarded by MMK, the appellant’s remedy was rather simple. It was to file this suit for recovery and that the respondent therefore had no legal defence to the suit but must pay the sum awarded. It is as simple as that.

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[24] A mandatory interpretation must be accorded to the word “shall” that appears in s. 16(2) of the Electricity Supply Act 1990.

[25] The House of Lords in *Re Racal Communications Ltd* [1980] 2 All ER 634 dealt with s. 441(3) of the Companies Act 1948 which provides, so far as is material, that the decision of a High Court judge on an application under s. 441 for an order authorising the inspection of the company’s books or papers where it is shown that there is reasonable cause to believe that an officer of the company has committed an offence in connection with the management of the company’s affairs and that evidence thereof is to be found in the company’s books or papers “shall not be appealable”, means, according to the House of Lords, what it says, and there is no justification for the view that its operation is restricted to questions of fact so as to give the Court of Appeal jurisdiction to hear an appeal from the decision of the judge on a question of law. The House of Lords also held that in any event, since the jurisdiction of the Court of Appeal is wholly statutory and appellate only and since it has no original jurisdiction, the effect of s. 31(1)(d) of the Supreme Court of Judicature (Consolidation) Act 1925, which provides that no appeal shall lie from the decision of the High Court or any judge thereof where it is provided by any Act that the decision of any court or judge the jurisdiction of which or of whom is vested in the High Court is to be final, is to deny the Court of Appeal all jurisdiction in connection with such decision whether they relate to issues of fact or of law. Lord Salmon writing a separate judgment for the House of Lords had this to say at p. 640 of the report:

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I am not at all surprised that s. 441(3) laid down that ‘The decision of a judge of the High Court ... on an application under this section shall not be appealable’. After all, s. 441(1) was making available exceptional powers to the Director of Public Prosecutions, the Board of Trade and chief officers of police providing that the High Court judge was satisfied that there was reasonable cause for the exercise of those powers. If he was not so satisfied and refused the application, Parliament, in my respectful view, rightly considered that that should be an end of the matter and that therefore there should be no appeal.

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- A [26] Lord Edmund-Davies, also writing a separate judgment for the House of Lords in *Re Racal Communications Ltd (supra)* observed at p. 641 of the report:

B My Lords, the determining issue in this appeal relates to the jurisdiction of the Court of Appeal to entertain an appeal against the decision of a High Court judge in a matter declared by statute to be not appealable.

[27] Continuing at p. 645, Lord Edmund-Davies aptly said:

- C But, since the words of ouster in s. 441(3) barred an appeal to the Court of Appeal, they had no jurisdiction to consider the matter at all.

- D [28] Sitting on the High Court bench, my learned brother Abdul Wahab Patail (now JCA) in *Kertih Port Sdn Bhd v. Owners of the Vessel "Shema"* [2009] 3 CLJ 574, at p. 581, had this to say:

E [13] Both rr. 7 and 10 use the word 'shall'. Its use means that the act specified is mandatory: see *Mohamed Suboh v. Devadas* [1981] 1 MLJ 136; [1980] 1 LNS 201; *Public Prosecutor v. Yap Min Woie* [1995] 1 MLJ 169 (FC).

- F [29] The word "shall" is to be construed as "directory" or "mandatory". Coleridge CJ in *Woodward v. Sarsons And Sadler (Birmingham Municipal Election)* [1875] LR 10 CP 733, at pp. 746 to 747, in trenchant terms had this to say:

... an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

- G [30] In *Rex v. Worcestershire Justices – Ex parte Lower Avon Navigation Company, Limited* [1939] 55 TLR 657, the justices refused to exercise a jurisdiction to appoint a river constable conferred upon them by the Canal (Offences) Act of 1840 on the grounds that the statute was obsolete and the appointment unnecessary. The court held that the Act conferred a right coupled with a duty to appoint constables and issued a rule *nisi* for a *mandamus*.

- I [31] In *Cullimore v. Lyme Regis Corporation* [1962] 1 QB 718, a local council, under the Coasts Protection Act 1949, prepared a works scheme for coast protection. The Act provided that the council should specify the apportionment of the costs of landowners within six months of the completion of the works.

Unfortunately, this was not done until twenty-three months after completion. It was held that by looking at the Act as a whole, without reference to the particular facts of the case, that the provisions were mandatory, and that as they had not been complied with the protection charge was null and void. But, even if the provisions had been directory, it could not be said that they had been substantially complied with and, consequently, it was held that the protection charge would equally be void.

[32] In *The British Insulated Wire Company, Limited v. The Prescott Urban District Council* [1895] 2 QB 463, 464, the court considered s. 174(2) of the Public Health Act 1875 which provided that every contract made by an urban authority under the said Act of the value of over £50 “shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed”. The court held that the said Act to be obligatory and not directory.

[33] In *re Burton and Blinkhorn* [1903] 2 KB 300 was a case under s. 32 of the Solicitors Act 1843 where the following words were employed “shall and may be struck off the roll” and the court held that those words gave no discretion. It was mandatory.

[34] In his written judgment, the learned JC made the following findings of fact (see p. 61 of the appeal record at Jilid 1):

6. Tidak berpuashati dengan pampasan yang dibuat oleh PTD itu, Plaintiff telah membuat rayuan kepada MMK selaras dengan seksyen 16(2) Akta tersebut.
7. MMK yang bertindak sebagai ‘Pihak Berkuasa Negeri’ di bawah seksyen-seksyen 11(7) dan 16(2) Akta tersebut telah memutuskan dalam rayuan pada 25.4.2001 bahawa Defendan dikehendaki membayar Plaintiff wang sejumlah RM557,108.00 dan RM247,808.00 yang kedua-duanya dicampur menjadi RM804,916.00 sebagai pampasan.

[35] Those findings of fact were categorised as material facts and the English language translations are as follows:

- (i) That the appellant being dissatisfied with the award of the Pentadbir Tanah Daerah (PTD) appealed to the MMK pursuant to s. 16(2) of the Electricity Supply Act 1990.
- (ii) That MMK acting as the “State Authority” pursuant to ss. 11(7) and 16(2) of the Electricity Supply Act 1990 decided on 25 April 2001 that the respondent was to pay the

A appellant as compensation the sums of RM557,108 and RM247,808 and when combined making a grand total of RM804,916.

B [36] Having found that the MMK is the State Authority, the learned JC should have dismissed the respondent's appeal against the O. 14 granted by the deputy registrar and should have affirmed the decision of the deputy registrar bearing in mind the purport and intent of s. 16(2) of the Electricity Supply Act 1990.

C [37] On behalf of the respondent, it was argued that there were no reasons given by the MMK to justify the astronomical increase in the compensation sums in favour of the appellant. It was argued that the assessment by the MMK was clearly exorbitant as it was well in excess of the respective market value of the whole plots of the lands.

D [38] The learned JC agreed with the respondent that MMK did not give reasons for its decision. We are of the view that the learned JC erred in failing to appreciate that s. 16(2) of the Electricity Supply Act 1990 does not require the MMK to give reasons for its decision since its decision is final and it is the decision of the "Ruler". It is ideal, at this juncture, to refer to art. 34 of the Constitution of the State of Kedah which states as follows:

F **34. Executive authority**

G (1) The Executive Authority of the State shall be vested in the Ruler and exercisable, subject to the provisions of any State Law, by him or by the State Executive Council or the Menteri Besar but the Legislative Assembly may by law confer executive functions on other persons.

(2) All executive authority of the State shall be expressed to be taken in the name of the Ruler.

H [39] Here, the appeal went to the MMK which was the State Executive Council – Exco, responsible for governing the affairs of the State of Kedah. And the MMK heard the appeal and made the decision.

I [40] Even the learned JC made a finding of fact that the MMK is the State Authority.

[41] It is interesting to note that the respondent in its affidavit in reply affirmed by Mohd Zahid bin Abd Bakar on 27 April 2005 as seen at pp. 84 to 93 of the appeal record at Jilid 2 particularly at p. 89 at para. 9 admitted that in respect of appeals to the State Authority from other land owners from the district of Kuala Muda and the district of Kota Setar from the awards of the Pentadbir Tanah Daerah (PTD), the State Authority had made decisions on such appeals and the State Authority had affirmed such awards. This clearly showed that the respondent acknowledged that the State Authority has the right to make such a decision and that decision "shall be final" within the meaning of s. 16(2) of the Electricity Supply Act 1990.

[42] To compound the matter further, the respondent by their letter dated 3 January 2001 as seen at pp. 489 to 490 of the appeal record at Jilid 3 which was addressed to the appellant's former solicitors admitted and acknowledged the fact that the decision of the State Authority is final. That letter was worded as follows:

Permohonan Bayaran Di Kaji Semula Terlibat Dengan Laluan Talian Penghantaran 300kV HVDC dari PMU Gurun ke Bukit Kayu Hitam, (Pendang), Kedah Darul Aman

Adalah saya dengan hormatnya merujuk kepada surat tuan bertarikh 12hb. Disember 2000 mengenai perkara tersebut di atas.

2. Adalah dimaklumkan bahawa pihak TNB telah menggunakan Akta Bekalan Elektrik 1990 untuk memasuki dan membuat kerja-kerja di atas hartanah-hartanah yang terlibat dengan laluan Talian Penghantaran Elektrik 300kV dari PMU Gurun ke Sempadan Malaysia Thailand. Seperti mana yang pihak tuan sedia maklum, berdasarkan Seksyen 16 Akta Bekalan Elektrik 1990, sekiranya mana-mana pihak yang tidak berpuashati dengan taksiran pampasan Pentadbir Tanah Daerah, maka mereka boleh membuat rayuan berhubung dengan perkara tersebut kepada Pihak Berkuasa Negeri, dimana keputusan Pihak Berkuasa Negeri tersebut adalah muktamad.

3. Sehubungan dengan itu, Pentadbir Tanah Daerah telah memaklumkan kepada pihak TNB bahawa rayuan yang dikemukakan oleh anakguam tuan telah dikemukakan kepada Pihak Berkuasa Negeri untuk pertimbangan sewajarnya. Pihak tuan akan dimaklumkan kelak setelah keputusan muktamad daripada Pihak Berkuasa Negeri berhubung dengan perkara ini diperolehi oleh TNB.

A Sekian untuk makluman tuan.

Terima kasih.

‘TNB-PENGGERAK KEMAJUAN NEGARA’

B Yang Benar,

Sgd. Illegible

(Abdul Rahman Mohammad)

b.p. KETUA (Jabatan Perkhidmatan Harta)

TENAGA NASIONAL BERHAD.

C [43] Yet the respondent was still questioning the compensation awarded by the MMK – the State Authority, when the respondent alluded to the same affidavit in reply affirmed by Mohd Zahid bin Abd Bakar on 27 April 2005 at para. 8.2 which states as follows (see p. 89 of the appeal record at Jilid 2):

D 8.2 Menurut Laporan Nilai yang disediakan oleh Tetuan Rahim & Co untuk Defendan sempena perolehan izinlalu untuk projek tersebut nilai pasaran terbuka untuk bahagian Lot 1026 adalah RM81,112.00 manakala MMK telah menetapkan pampasan sebanyak RM247,808.00 dan untuk bahagian Lot 2062 nilai pasaran terbukanya adalah RM40,358.50 manakala MMK telah menetapkan pampasan sebanyak RM557,108.00. Sesalinan laporan nilaian tersebut kini dikemukakan dan ditanda sebagai ekshibit ‘MZ-4’.

E F [44] The English language translation of para. 8.2 of the affidavit in reply of Mohd Zahid bin Abd Bakar reads as follows:

G 8.2 According to the valuation report prepared by Messrs Rahim & Co for the defendant pursuant to the ‘wayleave’ procedure, the open market value for Lot 1026 is RM81,112.00 while MMK fixed compensation in the sum of RM247,808.00 and for Lot 2062 the open market value is RM40,358.50 while MMK fixed compensation at RM557,108.00. A copy of the valuation report is forwarded and marked as exhibit ‘MZ-4’.

H [45] Flowing from that, the respondent argued that, firstly, the excessive compensation sums were unjustified and that, secondly, there was no evidence from the appellant to rebut the critical piece of evidence coming from the private valuer’s valuation report.

I [46] Still criticising the State Authority – the MMK, the respondent argued that in the same affidavit in reply affirmed by Mohd Zahid bin Abd Bakar on 27 April 2005 it was averred that only the appellant’s lands, namely, Lots 1026 and 2062 benefitted

from the drastic increase in compensation payments awarded by the State Authority. Paragraph 9 of that affidavit in reply was highlighted. It reads as follows (see p. 89 of the appeal record at Jilid 2):

9. Pemilik-pemilik tanah yang lain di Daerah-daerah Kuala Muda dan Daerah Kota Setar, dimana izin lalu diperolehi oleh Defendan, juga telah mengemukakan rayuan kepada Pihak Berkuasa Negeri terhadap keputusan PTD yang berkenaan dan MMK telahpun membuat keputusan terhadap rayuan-rayuan dimana keputusan penilaian pampasan oleh PTD Daerah Kuala Muda dan Daerah Kota Setar dikekalkan. Keputusan terhadap rayuan-rayuan untuk daerah-daerah ini telah dibuat oleh MMK sebelum keputusan rayuan Plaintiff dan rayuan-rayuan oleh sebahagian pemilik tanah di daerah Pendang dibuat.

[47] The English language translation of para. 9 of the affidavit in reply of Mohd Zahid bin Abd Bakar reads as follows:

9. The other land owners in the districts of Kuala Muda and Kota Setar where 'wayleaves' were obtained by the Defendant have appealed to the State Authority against the decisions of the PTD and MMK had given its decisions wherein their appeals against the compensations awarded by the PTDs in the districts of Kuala Muda and Kota Setar were affirmed. The decisions of their appeals by the MMK were handed down before the decisions of the plaintiff's appeal and some other land owners' appeal in the district of Pendang were made.

[48] And the respondent argued that there was no evidence from the appellant to explain as to why the affected lands in the Pendang district were singled out for special treatment by the State Authority (MMK) and as to why the landowners of these lands in Pendang received a "windfall" to the exclusion of the landowners in the other areas affected by the "wayleave" exercises such as the Kuala Muda and Kota Setar districts.

[49] Finally, the respondent referred to the same affidavit in reply affirmed by Mohd Zahid bin Abd Bakar on 27 April 2005, in particular to para. 10 which states as follows (see p. 90 of the appeal record at Jilid 2):

10. Mengikut senarai bayaran tambahan yang dikemukakan oleh MMK kepada PTD Daerah Pendang Defendan mendapat tahu bahawa tanah seorang ahli MMK YB Dato' Beh Heng Seong juga terlibat dalam pemerolehan izinlalu untuk projek tersebut dan beliau juga telah merayu terhadap keputusan PTD daerah Pendang.

- A [50] The English language translation of para. 10 of the affidavit in reply of Mohd Zahid bin Abd Bakar reads as follows:

B 10. According to the list of additional payment advanced by MMK to the PTD in the district of Pendang, the defendant came to know that a member of the MMK YB Dato' Beh Heng Seong was also involved in the 'wayleave' for the said project and he too has appealed against the decision of the PTD in the district of Pendang.

- C [51] And according to the respondent, there was no credible denial by the appellant in regard to the serious allegation that a member of the MMK could have been involved and in fact benefitted from the drastic increase in the compensation payments to the affected land owners in Pendang.

- D [52] By way of a rebuttal, the appellant averred by way of an affidavit in reply affirmed on 27 May 2005 as seen at pp. 95 to 101 of the appeal record at Jilid 2, particularly at para. 18, at p. 99, in this way:

E 18. Merujuk perenggan (10) Affidavit Jawapan saya tidak ada pengetahuan tentang isu tersebut dan jika benar saya percaya dan dinasihatkan oleh peguam saya isu tersebut tidak relevan untuk tuntutan dan hak saya.

- F [53] The appellant's reply was simply this. That the appellant had no knowledge about the averment in relation to a member of the MMK and that, at any rate, if the averment was true, the appellant was advised by his counsel to say that such an issue was irrelevant to the appellant's claim.

- G [54] Reference to s. 2 of the Local Government Act 1976 (Act 171) will now be made. That section defines the words "State Authority" in this way:

H (a) in relation to the States of West Malaysia, the Ruler-in-Council or Governor-in-Council of a State and includes in Negeri Sembilan the Yang di-Pertuan Besar acting on behalf of himself and the Ruling Chiefs; and

(b) in relation to the Federal Territory, the Minister charged with the responsibility for local government.

- I [55] And the "Ruler" as the constitutional monarch has been explained by Raja Azlan Shah FJ (as His Majesty then was) in *Public Prosecutor v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 15, at p. 20, in these trenchant terms:

Without going into legal semantics, the accused as Menteri Besar, Selangor, (*vide* Selangor G.N. 419/69) obviously is a member of the State Government. In a federation, like ours, each State has within its constitutional limitations a unitary system of Government in which the Legislative Assembly is supreme and the different functions or organs of Government can be mingled at will. The Legislative Assembly is closely interwoven with the executive by reason of members of the Government being also members of the Legislative Assembly, an arrangement loosely termed responsible Government. Under the Laws of the Constitution of Selangor, 1959, the Ruler is a constitutional monarch. He is the executive authority of the State, but, with certain exceptions, he acts on the advice of his Executive Council which he appoints. He appoints the Menteri Besar, he also appoints members of the Executive Council on the advice of his Menteri Besar. The Menteri Besar presides over the Executive Council. It is the Executive Council who is the executive organ of the State Authority and exercise executive functions in the name of the Ruler. The Menteri Besar is paid from the State coffers. If he is not a member of the Government, I do not know who is.

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[56] Likewise in Kedah, the “Ruler” as the constitutional monarch is also “the executive authority of the State” and in this connection art. 34 of the Laws of the Constitution of Kedah as reproduced earlier reflects the legal position of the day. The State Executive Council has every right to act as the State Authority and its decision must be final pursuant to s. 16(2) of the Electricity Supply Act 1990.

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[57] We wish to add that the decisions of the MMK are State secrets and no reasons need be given. It is here that the learned JC fell into error. His Lordship erred in holding that the award by the MMK was on the high side when he did not have before him the reasons and the deliberations of the MMK. We categorically hold that because of the binding consensus of secrecy, the MMK does not have to give reasons for its decisions.

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[58] In holding that the award by the MMK was excessive, the learned JC was indirectly reviewing the decision of the MMK. In our judgment, the learned JC has no power to do so. This is another instance where his Lordship erred.

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[59] The learned JC relied on the valuation report of the respondent and held that the award by the MMK was excessive. But the Electricity Supply Act 1990 does not make any provision for an award by the MMK to be challenged since the MMK’s decision is final.

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- A [60] Bearing in mind that the deliberations of the MMK are secret, the learned JC failed to appreciate that the deliberations of the MMK would have taken into consideration factors and reasons not within the ambit of the valuation report.
- B [61] Public policy demands that the deliberations of the MMK must be kept secret and when the learned JC allowed the respondent's appeal he unwittingly allowed for a challenge to be made against the decision of the MMK and in doing so he has set a precedent which cannot and should not be sustained.
- C [62] The learned JC failed to take into account that although the appellant had appealed by way of his letter dated 20 June 1997 as reflected at pp. 486 to 487 of the appeal record at Jilid 3, and the respondent having admitted that it had knowledge of such an appeal as seen at para. 3 of the respondent's letter to the appellant's former solicitors at pp. 489 to 490 of the appeal record at Jilid 3, yet the respondent failed to forward a copy of its valuation report to the MMK for its consideration and having failed to do so the respondent must be deemed to have accepted the wisdom of the MMK to arrive at its decision. The failure of the respondent to submit its valuation report to the MMK must be held against the respondent.
- F [63] Thus, what transpired during the deliberations of the MMK without the benefit of the respondent's valuation report must, on the basis of public policy, be kept secret and should not be divulged to anyone.
- G [64] Public policy is certainly variable. It differs from country to country. It also varies from generation to generation. Even in the same generation, it may vary. It also varies in respect of particular topics. And the difficulty of discovering what public policy is at any given time should not absolve the bench from the duty of applying public policy generously. Roscoe Pound in "*Law and Morals*" – *The Ideal Element in Law* [1958] at para. 62 aptly said:
- H There are many situations, however, where the course of judicial action is left to be determined wholly by the judge's individual sense of what is right and just.
- I [65] But public policy cannot conflict with existing Parliamentary legislation. Public policy merely complements and not abrogate Parliamentary legislation. According to the case of *In re Houghton, Houghton v. Houghton* [1915] 2 Ch 173, there cannot be public policy leading to one conclusion when there is an existing statute

directing a precisely opposite conclusion. Here, we have s. 16(2) of the Electricity Supply Act 1990 which states that the decision of the State Authority shall be final and effect must be given to it. Public policy too demands that finality to the decision of the State Authority be recognised.

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[66] Public policy cuts beneath the hard and dull surface of the law and shows to us the vibrant spirit that is imprisoned in it. One ingredient of that vibrant spirit is the law of reason. The general line of thought shows that public policy is a tool frequently used by judges.

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[67] The metaphor that public policy is an unruly horse is no longer apt. The unruly horse can be subdued. Swinfen Eady J, in *In re Beard, Reversionary And General Securities Company, Limited v. Hall, In re Beard, Beard v. Hall* [1908] 1 Ch 383, 386 to 387 regarded public policy as a Pegasus that might soar high and beyond the momentary needs of the community.

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[68] Be that as it may, it must be recalled that the decision of the MMK was made on 25 April 2001 and it was the Pengarah Tanah dan Galian (PTD) who acted as the representative of the MMK and who informed the parties of the decision of the MMK. If the respondent felt dissatisfied with the decision of the MMK then the respondent ought to have filed an appeal within three months from the date on which the said decision was communicated to it, pursuant to s. 418(1) of the National Land Code 1965 ("NLC"). Unfortunately, the respondent failed to comply with s. 418(1) of the NLC and such failure must be held to be fatal.

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[69] The learned JC held that the appellant had compromised his position by accepting the earlier award of RM25,434 before the appeal to the MMK was heard and this was said to be a triable issue. But the learned JC failed to consider the appellant's averment in his affidavit dated 27.5.2005 at para. 7 at p. 96 of the appeal record at Jilid 2 where the appellant averred that his acceptance of the award of RM25,434 was subject to an appeal. Of importance to note is the absence of an affidavit in reply by the respondent to the appellant's affidavit dated 27 May 2005. In the circumstances, the appellant's averment in his affidavit dated 27 May 2005 must be accepted as true.

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- A [70] It is wrong on the part of the learned JC to hold as he did that the MMK's authority to consider that the appeal arose only if the appellant had either refused to accept the offer of RM25,434 or had accepted it "without prejudice" and since the
- B MMK was made without authority and therefore void. In our judgment, s. 16(2) of the Electricity Supply Act 1990 in its present form makes no provision for such an interpretation. It is also our judgment that the purported estoppel ought not to go for trial because, in the first place, there was no estoppel at all.
- C [71] The learned JC vigorously applied the following two authorities:
- (a) *B. Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14, PC; and
- D (b) *Aziz bin Abdul Rahman v. Attorney-General, Singapore* [1978] 1 LNS 13.
- E [72] Factually speaking, in the present appeal, the appellant had forwarded his appeal letter to the MMK but the respondent failed to submit any document including his valuation report to the MMK. However, the respondent informed the appellant's former solicitors that the Pentadbir Tanah Daerah (PTD) would communicate to the appellant in regard to the decision of the
- F MMK. On the facts, the present appeal are poles apart from the two authorities relied upon by the learned JC.
- G [73] In *B. Surinder Singh Kanda (supra)*, the court there held that a judge or the adjudicator must not hear evidence or receive representations from one side behind the back of the other. Here, in the present appeal, it was the respondent who withheld from presenting its evidence to the MMK.
- H [74] In *Aziz bin Abdul Rahman (supra)*, the appellant there was not provided with the evidence that was presented before the medical board. Here, in the present appeal, the decisions of the MMK are secret on the grounds of public policy and there was no necessity to disclose the deliberations of the MMK.
- I [75] Finally, the learned JC wrongly took into consideration the following matters as constituting "other reasons" to displace the O. 14 application:

- (a) Whether the MMK knew that the appellant had already received RM25,434? When, in reality, there is a letter from the MMK to show that this was a “bayaran tambahan”. A
- (b) Why the MMK did not invite the respondent’s representative to attend the appeal? It must be borne in mind that even the appellant’s representative was not invited and that the meetings of the MMK were held in private and were strictly confidential. B
- (c) Whether the MMK heard the appeal of the member of the MMK in regard to his appeal pertaining to the Pendang land? In reality, there was no evidence advanced by the respondent as to the involvement of that member of the MMK in the MMK’s deliberations. C
- [76] Be that as it may, these matters which were said to constitute “other reasons” in order to displace the O. 14 application were not raised by the respondent before the deputy registrar at all. D
- [77] For the reasons adumbrated above, we unanimously allowed the appeal with costs of RM20,000. We set aside the decision of the learned JC dated 10 December 2007. We also made an order that the deposit to be refunded to the appellant. E

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